In *Buie*, this Court clearly defined a protective sweep as being "incident to an arrest," 494 U.S. at 327, and as occurring "as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." *Id.* at 333. Yet, although set forth simply enough, six circuit courts and a panel of another have held that protective sweeps need not be incident to arrest. Without a definitive rule issued by this Court, the protections of the Fourth Amendment cannot be properly realized.

As reiterated by this Court in *Belton*:

> "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" [LaFave] at 141.
>
> In short, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-214[(1979)].

453 U.S. at 458.

A grant of certiorari in this case would enable this Court to issue a single, clear standard for this nation's police officers to follow and for its courts to enforce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

Dated: February 13, 2006

APPENDIX A

Appendix A

United States Court of Appeals,Second Circuit.
UNITED STATES of America, Appellee,
v.
Alfred G. MILLER, Defendant-Appellant.
No. 04-2637-CR.

Argued: Sept. 16, 2005.
Decided: Nov. 16, 2005.

David Wikstrom, Law Office of David Wikstrom, New York, NY, for Defendant-Appellant.
Sarah Y. Lai, Assistant United States Attorney (Peter G. Neiman, Assistant United States Attorney, of counsel; David N. Kelley, United States Attorney for the Southern District of New York, on the brief), United States Attorney's Office for the Southern District of New York, New York, NY, for Appellee.

Before: McLAUGHLIN and CABRANES, Circuit Judges, and MUKASEY, District Judge.*

JOSÉ A. CABRANES, Circuit Judge.
We consider here whether a law enforcement officer who is lawfully present in a particular area of a home for a purpose other than the execution of an arrest warrant may conduct a protective sweep pursuant to *Maryland v. Buie*, 494 U.S. 325,

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*The Honorable Michael B. Mukasey, Chief Judge, United States District Court for the Southern District of New York, sitting by designation.

110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), if he has reasonable suspicion that an individual present in another area of the home poses a threat to those on the premises. We conclude that an officer in a home under lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party, may conduct a protective sweep when the officer possesses "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the ... scene." *Id.* at 334, 110 S.Ct. 1093.

Defendant Alfred G. Miller appeals from his conviction following a bench trial in the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) for possessing a firearm after having been convicted previously of a felony, in violation of 18 U.S.C. § 922(g)(1).[1] In advance of trial, Miller moved to suppress the admission of two firearms and Miller's post-arrest custodial statement admitting possession of the firearms on the ground that they were procured in violation of the Fourth Amendment. At an evidentiary hearing held by the District Court, the evidence showed that a police officer, who was lawfully present in Miller's apartment to carry out a protective order issued to Miller's roommate, had followed Miller into his bedroom "[f]or safety," Tr. of Suppression Hr'g, Jan. 30, 2004 ("Tr."), at 24, and there encountered a firearm in plain view. The officer then

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[1]18 U.S.C. 922(g)(1) makes it unlawful for a person "who has been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year ... to possess in or affecting commerce[ ] any firearm or ammunition."

arrested Miller, who turned over another firearm and admitted possession of both firearms while in custody.

In the District Court, the parties disputed whether the seizure of the initially-recovered firearm violated the Fourth Amendment. Miller moved to suppress the evidentiary use of that firearm, arguing that the officer's entry into Miller's bedroom was unlawful, and he moved also to suppress the second firearm and his post-arrest custodial statement, contending that they were the fruits of an unlawful search. The District Court, in a careful and thoughtful opinion, denied the motion on the ground that the initially-recovered firearm had been discovered during a permissible protective sweep of Miller's bedroom pursuant to *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). *See United States v. Miller*, 306 F.Supp.2d 414, 416-18 (S.D.N.Y.2004). We agree with the District Court's conclusion and hold that an officer lawfully present in a particular area of a home may conduct a limited protective sweep of another area of the home provided the officer has reasonable suspicion that the other area harbors a threat to the safety of those on the scene.

Although we are not persuaded by Miller's arguments challenging his conviction, we nevertheless remand the cause pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir.2005), so that the District Court may consider whether to resentence Miller.

BACKGROUND

Two witnesses testified at the hearing on Miller's motion to suppress evidence: Officer Henry Vidal of the New York City

Police Department ("N.Y.P.D."), for the government, and Ernesa Mozon, Miller's girlfriend, for Miller. The District Court specifically credited Vidal's testimony, did not credit the contrary testimony of Mozon, and found the events to have occurred as Vidal testified.[2] The following account traces the findings of the District Court.

Miller's cousin and roommate, Kendu Newkirk, obtained an order of protection against Miller in the Bronx County Family Court on September 23, 2003. The order provided, *inter alia,* that Newkirk could enter the apartment he had been sharing with Miller (the "apartment") "on one occasion with police assistance to remove personal belongings not in issue in litigation: to wit[,] any undisputed personal belongings." *Newkirk v. Miller,* No. O-19936-03, Temp. Order of Prot., at 1 (N.Y. Fam. Ct. Bronx County Sept. 23, 2003).

On the day that the order of protection was signed, N.Y.P.D. Officers Henry Vidal and David Sanchez accompanied Newkirk to the apartment pursuant to the terms of the order. Before the trio went to the apartment, Newkirk informed the officers that he had obtained the order of protection because Miller had threatened to "kick [Newkirk's] ass and put a bullet through his head." Tr. at 9.

Vidal, Sanchez, and Newkirk arrived at the apartment together, and Newkirk opened the door with his keys. The apartment had a foyer, a living room, two bedrooms to the left of a hallway, and a room at the end of the hallway. Encountering Miller and Mozon upon entry, the officers explained that they

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[2]On appeal, Miller does not assert any challenge to the facts as found by the District Court.

had come to serve an order of protection and assist Newkirk in obtaining his belongings. Regarding Newkirk, Miller told the officers, "You better watch him, I don't want [him] to take my stuff." *Id.* at 13. Newkirk began to move about the apartment to collect his belongings. Vidal followed Newkirk into the second bedroom on the left side of the hallway (the "second bedroom"), but then immediately left when Newkirk did. Newkirk then proceeded to remove property from the other rooms in the apartment, and the officers waited for Newkirk in the apartment's hallway. At one point, while in the process of moving items out, Newkirk stepped outside the apartment and the officers stayed inside. Miller, who had remained in the living room, approached the officers, who were standing in the apartment's hallway near the entrance to the second bedroom, and asked whether he could enter the second bedroom to retrieve something. After receiving permission from Vidal, Miller entered the second bedroom and Vidal followed Miller in "[f]or safety." *Id.* at 24.

Once inside the second bedroom, Miller gathered certain belongings, and began to leave the room. Vidal followed Miller towards the door of the room to exit, but on his way out, Vidal saw a shotgun with a black barrel and a yellow band standing upright in an open closet. Miller was arrested, and he then turned over another firearm and admitted possession of both firearms to the officers.

On November 21, 2003, a one-count indictment was filed charging Miller with possessing a firearm after having been convicted previously of a felony, in violation of 18 U.S.C. § 922(g)(1). Miller thereafter brought a motion to suppress the admission into evidence of the firearms and his post-arrest custodial statement on the ground that they were obtained in

violation of his Fourth Amendment rights. After an evidentiary hearing held on January 30, 2004, the District Court filed a Memorandum Opinion denying Miller's motion and concluding that Officer Vidal had discovered the initially-recovered firearm in plain view while engaging in a protective sweep pursuant to *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). *See Miller*, 306 F.Supp.2d at 416-18. The District Court determined that Vidal possessed " 'articulable facts' [that] gave rise to the entirely rational inference that allowing Miller unsupervised access to the [second] bedroom might prove dangerous to the safety of the officers and Newkirk." *Id.* at 417. The Court also determined that Vidal had conducted an appropriately limited protective sweep under the circumstances. *Id.*

Following the denial of his motion to suppress evidence, Miller consented to a bench trial on stipulated facts and preserved his appellate rights with respect to the District Court's denial of his suppression motion. Miller was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and on April 30, 2004, he was sentenced principally to a twenty-nine month term of imprisonment.

On appeal, Miller challenges the District Court's conclusion that the initially-recovered firearm was discovered during a constitutionally permissible *Buie* protective sweep.

DISCUSSION

A. *Buie* Protective Sweeps

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless search of a home is presumptively unreasonable. *See Groh v. Ramirez,* 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004); *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). That presumption is rebuttable, however, *see Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), as "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *United States v. Knights,* 534 U.S. 112, 118-19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (quoting *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)).

In *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), the Supreme Court applied the Fourth Amendment reasonableness test and permitted a limited warrantless search, or protective sweep, in a home by officers who were executing an arrest warrant inside the home and who had a reasonable suspicion that an individual posing a threat to the officers was present elsewhere on the premises. *Id.* at 334, 110 S.Ct. 1093. The Supreme Court explained that the Fourth Amendment did not prohibit the officers from "tak[ing] reasonable steps to ensure their safety after, and while making, the arrest." *Id.* Accordingly, the officers could search beyond the area immediately adjoining the place of arrest if they had "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an

individual posing a danger to those on the arrest scene." *Id.* The Court emphasized, however, that any such warrantless sweep may not be unnecessarily invasive and "may extend only to a cursory inspection of those spaces where a person may be found." *Id.* at 335, 110 S.Ct. 1093. Moreover, the sweep must "last[ ] no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Id.* at 335-36, 110 S.Ct. 1093.

Buie 's protective sweep exception to the warrant requirement was constructed on the foundational reasoning of *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), both of which permitted warrantless searches in specific contexts to ensure the safety of officers. In *Terry,* the Supreme Court sanctioned brief on-the-street frisks for weapons in circumstances when a reasonably prudent officer would be justified in believing, based on specific, articulable facts, that he was dealing with a person who might be armed and dangerous. *See Terry,* 392 U.S. at 21, 24, 27, 88 S.Ct. 1868. *Long* extended *Terry* 's reasoning to the context of a roadside stop, allowing officers to search the passenger area of an automobile for weapons when the officers possess specific and articulable facts that warrant the reasonable belief that a suspect is dangerous and may have immediate access to a weapon. *See Long,* 463 U.S. at 1049-50, 103 S.Ct. 3469. In *Buie,* the Court read *Terry* and *Long* to protect "the immediate interest of [ ] police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them." *Buie,* 494 U.S. at 333, 110 S.Ct. 1093. In addition, the Court recognized that

the factors justifying warrantless searches in *Terry* and *Long* were at play, perhaps with even greater force, when officers find themselves "at the disadvantage of being on [their] adversary's 'turf' " during the in-home execution of an arrest warrant, because "[a]n ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Id.*

B. Protective Sweeps in Other Circumstances

Twice before, we have confronted the question of whether *Buie* protective sweeps may be conducted when officers are lawfully present in a home for a reason other than the in-home execution of an arrest warrant. *See United States v. Gandia,* 424 F.3d 255 (2d Cir.2005); *United States v. Moran Vargas,* 376 F.3d 112 (2d Cir.2004). In each of those cases, however, we concluded that we did not need to reach the issue because of the absence of specific and articulable facts to support a determination that reasonable suspicion existed. *See Gandia,* 424 F.3d at 257; *Moran Vargas,* 376 F.3d at 115. We now hold that a law enforcement officer present in a home under lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party, may conduct a protective sweep when the officer possesses "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the ... scene." *Buie,* 494 U.S. at 334, 110 S.Ct. 1093.

At the core of *Terry, Long* and *Buie* is the common understanding that the Fourth Amendment's reasonableness

requirement is sufficiently flexible to allow officers who have an objectively credible fear of danger to take basic precautions to protect themselves. *Buie* recognized that when officers are inside a home-ordinarily an enclosed, unfamiliar space-they are particularly vulnerable to surprise attacks. *Id.* at 333, 110 S.Ct. 1093. The Court's paramount concern in *Buie* was not why the officers were present in the home, but rather, why the officers might fear for their safety and what they could do to protect themselves. *Buie* 's logic therefore applies with equal force when officers are lawfully present in a home for purposes other than the in-home execution of an arrest warrant, at least where their presence may expose the officers to danger that is similar to, or greater than, that which they would face if they were carrying out an arrest warrant. *See id.* Indeed, officers executing an arrest warrant may at times enjoy the tactical benefits of counteracting a potential threat by engaging in careful planning and entering with significant force. By contrast, in other circumstances where they are present lawfully-such as, for example, responding to an emergency call or serving an order of protection-officers may be compelled to enter dangerous environments without an adequate opportunity to take effective prophylactic measures.

Several of our sister circuits have refused to confine the protective sweep doctrine to contexts in which officers execute arrest warrants. *See, e.g., United States v. Martins,* 413 F.3d 139, 150 (1st Cir.2005) ("We hold ... that police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry."), *cert. denied,* --- U.S. ----, 126 S.Ct. 644, 163 L.Ed.2d 520 (2005); *Leaf v. Shelnutt,* 400 F.3d 1070, 1086-88 (7th Cir.2005) ("[I]t was not necessary for the officers to have made

an arrest in order for their search of the apartment to be justified; the only question is whether the search was objectively reasonable."); *United States v. Gould,* 364 F.3d 578, 584 (5th Cir.2004) (en banc) ("[W]e hold that arrest is not always, or *per se,* an indispensable element of an in-home protective sweep, and that although arrest may be highly relevant, particularly as tending to show the requisite potential of danger to the officers, that danger may also be established by other circumstances."), *cert. denied,* 543 U.S. 955, 125 S.Ct. 437, 160 L.Ed.2d 317 (2004); *United States v. Taylor,* 248 F.3d 506, 513 (6th Cir.2001) ("[T]he principle enunciated in *Buie* with regard to officers making an arrest-that the police may conduct a limited protective sweep to ensure the safety of those officers-applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained."); *United States v. Garcia,* 997 F.2d 1273, 1282 (9th Cir.1993) (officers permitted to conduct protective sweep following consent entry); *United States v. Patrick,* 959 F.2d 991, 996-97 (D.C.Cir.1992) ("Once the police were lawfully on the premises, they were authorized to conduct a protective sweep based on their reasonable belief that one of its inhabitants was trafficking in narcotics."). *But see United States v. Davis,* 290 F.3d 1239, 1242 n. 4 (10th Cir.2002) (reading *Buie* narrowly to apply only in the context of an arrest); *United States v. Reid,* 226 F.3d 1020, 1027 (9th Cir.2000) (same). We agree with the majority of our sister circuits and adopt a commonsense understanding of the requirements of the Fourth Amendment in circumstances such as those presented here.

We are, of course, keenly aware that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Ct.,* 407

U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). We note, however, that *Buie* 's progenitors, *Terry* and *Long*, did not concern searches stemming from arrests. *See Terry*, 392 U.S. at 24, 88 S.Ct. 1868; *Long*, 463 U.S. at 1049-50, 103 S.Ct. 3469. Moreover, *Buie* itself allowed for a protective sweep *after* an arrest had been completed. *See Buie*, 494 U.S. at 334-35, 110 S.Ct. 1093. These factors, along with *Buie* 's grounding in the Fourth Amendment's reasonableness standard, convince us that the fact of an arrest or an attempted arrest (with or without an arrest warrant) is not a necessary precondition to a lawful protective sweep. The restriction of the protective sweep doctrine only to circumstances involving arrests would jeopardize the safety of officers in contravention of the pragmatic concept of reasonableness embodied in the Fourth Amendment. Although, an "arrest may be highly relevant" to the determination of whether officers possess reasonable suspicion of danger, *Gould*, 364 F.3d at 584, the effectuation of an arrest, regardless of whether pursuant to a warrant, is not the *sine qua non* of a permissible protective sweep. *See id.* Accordingly, we hold that specific, articulable facts giving rise to a reasonable inference of danger may justify a protective sweep in circumstances other than during the in-home execution of an arrest warrant.[3]

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[3]In *Gandia*, we echoed the concern expressed by the Fifth Circuit in *Gould* that the application of *Buie* to consent entries might provide officers an opportunity to circumvent the warrant requirement, as they could request entry with the ulterior purpose of conducting a protective sweep. *See Gandia*, 424 F.3d at 262-63 (citing *Gould*, 364 F.3d at 589). In *Gandia*, that concern was raised because the police officers had asked the defendant-who had been a party to an altercation elsewhere-if they could repair to his apartment to discuss the altercation. *Id.* at 263. We noted that "there was no need for the police officers to enter Gandia's home in the first place" and that they had simply gone there "for their own

C. Reasonable Suspicion

We now turn to whether Officer Vidal conducted a lawful protective sweep when he followed Miller into the second bedroom. We review *de novo* the District Court's legal conclusion that the Fourth Amendment was not violated. *See Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Gandia*, 424 F.3d at 261.

As set forth in *Buie* and as discussed above, a protective sweep may only be conducted when officers possess "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the ... scene." *Buie*, 494 U.S. at 334, 110 S.Ct. 1093. In addition, the sweep must be limited to "a cursory inspection of those spaces where a person may be found." *Id.* at 335, 110 S.Ct. 1093. Furthermore, the sweep must not last longer than necessary to allay the reasonable suspicion of danger and, in any event, not longer than it takes for the officers to finish the work for which they are lawfully on the premises. *See id.* at 335-36, 110 S.Ct. 1093.

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convenience" while taking his statement. *Id.* at 263. Here, by contrast, the officers went to Miller's apartment upon the request of his roommate Newkirk pursuant to a judicial order of protection that had been signed by a judge that very day. *See id.* (noting that the risk of pretext may be diminished by the review of an entry "through judicial process" or by "emergent conditions"). Nothing in the record suggests that the officers gained entry into Miller's apartment for any reason other than to assist Newkirk and to carry out the order of protection according to its terms.

D. Officer Vidal's Sweep of the Second Bedroom

In entering the second bedroom, Vidal was aware of significant facts that justified his belief that he needed to follow Miller "[f]or safety." Tr. at 24. Vidal knew that (1) Miller had made a specific threat to shoot Newkirk in the head; (2) Newkirk had taken the threat seriously and obtained an order of protection; (3) this was a domestic dispute in which the emotions that triggered the threat might resurface; and (4) Miller had expressed suspicion that Newkirk might "take [his] stuff" while moving out of the apartment. In light of these specific facts and the inferences a reasonable officer might draw from them-namely, that Miller might use unsupervised time in the second bedroom to obtain a weapon-it was reasonable for Vidal to conclude that if Miller entered the second bedroom alone, he might pose a threat to those on the scene.[4] *See Martins,* 413

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[4]Here, Vidal knew that Miller was the potential threat. We acknowledge that *Buie* involved the risk of an unknown threat posed by hidden third parties, *see Buie,* 494 U.S. at 333, 336, 110 S.Ct. 1093; *see also Gandia,* 424 F.3d at 261-62, yet we discern nothing in the reasoning of *Buie* that prohibits its application to sweeping for obvious or known threats. In other words, we do not read the Fourth Amendment-whose touchstone is reasonableness-to require that a threat be hidden and unknown before an officer can engage in appropriately limited protective action. Our understanding is consistent with the foundational cases upon which *Buie* was decided, *Terry* and *Long,* as well as another case discussed in *Buie, Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), all of which contemplate limited warrantless searches "in order for police 'to assure themselves that *the persons with whom they [are] dealing* [are] not armed with, or able to gain immediate control of, a weapon.' " *Gandia,* 424 F.3d at 262 (quoting *Buie,* 494 U.S. at 333, 110 S.Ct. 1093) (emphasis added) (alterations in original).

We also note that we are not troubled here by the fact that Vidal granted Miller permission to enter the room. That fact does not suggest that Vidal considered it safe for Miller to enter the room alone; indeed,

F.3d at 150 (explaining that there was reasonable suspicion to justify a *Buie* sweep in a non-arrest context when "the inference of danger was much more real and immediate than a generic fear"); *cf. United States v. Waldner,* 425 F.3d 514, 517 (8th Cir.2005) (holding that a "protective sweep exceeded its permissible scope under the Fourth Amendment" when an officer "entered [a] room based upon his belief that [an individual being served with a protective order] might go there to get a firearm" even though the individual had not entered the room and was "five to ten feet from the room when [the officer] entered"); *Gandia,* 424 F.3d at 264 (determining that officers lacked specific articulable facts to justify a search, because they looked in "an adjoining room to which [defendant] had no ready access"). When Miller entered the second bedroom, "the danger and imminence of ambush then dramatically increased, justifying the [brief] 'sweep.' " *Gould,* 364 F.3d at 589. Vidal did not engage in a sweep of areas inaccessible to Miller for the purpose of ferreting out secreted firearms, *cf. Waldner,* 425 F.3d at 517; *Gandia,* 424 F.3d at 264, but rather, followed Miller-about whom Vidal had an objectively reasonable fear-to ensure the safety of everyone on the scene.

The protective sweep that Vidal conducted was limited. It amounted to following Miller into the second bedroom and

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Vidal's awareness of the potential threat prompted him to accompany Miller. Moreover, nothing in the record suggests that Vidal gave his approval with the purpose of justifying a protective sweep of Miller's bedroom. *See* note 3 *supra.* In fact, Vidal testified that he did not know to whom the room that Miller sought to enter belonged. That testimony, which the District Court credited and defendant does not challenge, is particularly significant in light of the fact that Newkirk had gone into that very room, among others, as he was removing his belongings from the apartment.

watching him briefly. When Miller immediately left the room, Vidal followed him and thereupon caught sight of a firearm in plain view inside an open closet as he walked out of the room. This quick and unobtrusive search was narrowly tailored to dispel the threat that Miller would have posed by being in the second bedroom alone. Consequently, we conclude that Vidal did not violate Miller's Fourth Amendment rights by entering the second bedroom.

On appeal, Miller does not dispute the application of the plain view doctrine to the discovery of the shotgun in the closet. When inside the second bedroom, Vidal saw a shotgun in the open closet and lawfully seized it pursuant to the plain view doctrine. *See Minnesota v. Dickerson,* 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) ("Under [the plain view] doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant."). At that point, the officers had a legitimate basis for arresting Miller. Accordingly, the other firearm that Miller turned over and the custodial statements he made thereafter were not the result of unlawful conduct and therefore were not excludable as "fruit of the poisonous tree." *See Segura v. United States,* 468 U.S. 796, 804-05, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984); *Wong Sun v. United States,* 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

E. *Crosby* Remand

Miller requests that this action be remanded pursuant to *United States v. Crosby,* 397 F.3d 103 (2d Cir.2005), and the

government has consented. We agree and we thus remand the cause to the District Court so that it may determine whether to resentence Miller in accordance with the currently applicable statutory requirements as outlined in *Crosby.*

CONCLUSION

To summarize, we hold that:
(1) the *Buie* protective sweep doctrine may apply in situations other than the in-home execution of an arrest warrant;
(2) in light of the specific, articulable facts presented here, and the reasonable inferences that could be drawn by the police officer, the officer was justified in conducting a protective sweep of the second bedroom;
(3) the protective sweep was adequately limited in scope to satisfy the requirements of the Fourth Amendment;
(4) the shotgun seized was in plain view of the officer once he had lawfully entered the second bedroom to conduct the protective sweep; and
(5) because the shotgun observed in plain view by the police officer was lawfully seized, the other evidence obtained thereafter was not "fruit of the poisonous tree."

* * * * * *

Accordingly, we conclude that the District Court properly denied defendant's suppression motion. The judgment of conviction is AFFIRMED, and the cause is REMANDED to the District Court for consideration of whether to resentence defendant in accordance with *United States v. Crosby,* 397 F.3d 103 (2d Cir.2005).

APPENDIX B

Appendix B

United States District Court
Southern District of New York

UNITED STATES of America,

v.

Alfred G. MILLER, Defendant.

No. 03 CR. 1380(LAK)

MEMORANDUM OPINION

Appearances:

Sarah Y. Lai, Assistant United States Attorney, David N. Kelley, United States Attorney, New York City, for Plaintiff.
Leonard F. Joy, New York City, for Defendant.

KAPLAN, District Judge.

Defendant Alfred G. Miller, who was indicted for being a felon in possession of firearms, moved to suppress physical evidence and a custodial statement that he alleges were obtained in violation of the Fourth Amendment when police officers recovered from his residence two guns found while officers were present assisting with an order of protection. The Court held an evidentiary hearing on January 30, 2004 and denied the

motion on February 23, 2004 just prior to the start of the trial.[1] This memorandum opinion explains the basis for that decision.

Facts

In September 2003, Miller resided in a Bronx apartment with his cousin, Kendu Newkirk. The two had a disagreement in consequence of which Newkirk obtained an order of protection ("OP") against Miller from the Family Court of the State of New York, Bronx County.[2]

On September 23, 2003, New York City police officers Vidal and Sanchez were assigned to assist Newkirk in serving the order, the terms of which allowed Newkirk to retrieve personal belongings from the apartment. Before leaving the precinct house for the apartment, Newkirk told the officers that he had obtained the OP because Miller "was threatening him" and had told Newkirk "he was going to kick his ass and put a bullet through his head."[3] The three proceeded to the apartment where they found Miller and his girl friend. The officers explained their business and asked them to wait in the living room, which

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[1]Miller then waived a jury and was tried on stipulated facts and found guilty.

[2]Hearing Transcript ("Tr.") 7, 10.

[3]*Id.* 9.

was immediately adjacent to the apartment door.[4] Newkirk then proceeded to gather his belongings. At some point, he entered the bedroom in the rear of the apartment, and Vidal followed him into the room.[5] Moments later, Newkirk left the bedroom, followed by Vidal, and returned to the front of or left the apartment, leaving Vidal in the hallway in front of the door to the rear bedroom and Sanchez somewhere between the door to the living room and the door to the rear bedroom.[6] Miller then came out of the living room into the hall and asked Vidal if he could go into the rear bedroom to retrieve "some stuff."[7] Vidal agreed, allowed Miller to pass, and then followed him into the room. He explained at the hearing that he did so "for safety."[8] Miller remained in the room only briefly. After he left, however, Vidal glanced at a closet on the left side of the room, the door to which had been left open, and noticed a shotgun in plain view.[9] In response to questioning, Miller admitted to having another firearm and turned it over. After being placed under arrest, Miller acknowledged possession of the two firearms.

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[4]*Id.* 26-27.

[5]*Id.* 14-15.

[6]*Id.* 41, 77.

[7]*Id.* 18, 75.

[8]*Id.* 24.

[9]*Id.* 18-19. Based on defendant's statements to the police, a second firearm also was recovered from the bedroom.

Miller contends that the shotgun was discovered as a result of an unlawful search and that his admission of possession of the shotgun and the other firearm were fruits of that illegality. Many of the facts concerning the circumstances were disputed, but the foregoing constitute the Court's findings as to what occurred. In view of those findings, the legality of the search turns entirely on whether Officer Vidal's presence in the rear bedroom at the time he discovered the shotgun was lawful.

Discussion

The Fourth Amendment bars only unreasonable searches and seizures, reasonableness being its "central requirement."[10] A warrantless search of a residence is " *'per se* unreasonable under the Forth Amendment-subject only to a few specifically established and well-delineated exceptions.' "[11] In the context of a motion to suppress, a defendant subjected to such a search must show he had a reasonable expectation of privacy in the relevant location. If so, the search is unlawful unless the government establishes that it fell within one of the exceptions

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[10]*Koch v. Brattleboro*, 287 F.3d 162, 166 (2d Cir.2002) (citing *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001)).

[11]*Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

to the warrant requirement.[12]

In *Maryland v. Buie,*[13] the Supreme Court held the Fourth Amendment permits cursory protective sweeps of spaces where a person might be found in conjunction with in-home arrests if "articulable facts" warrant an inference "that the area to be swept harbors an individual posing a danger to those on the arrest scene."[14] In so doing, it focused on the enhanced risk of danger experienced by an officer in a home, as opposed to on the street or along the highway, stating that "an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings."[15] And it built upon *Terry v. Ohio,* [16] which had upheld warrantless, pre-arrest, on-the-street frisks for weapons based on "specific and articulable facts ... that [the officer] is dealing with an armed and dangerous individual," [17]

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[12]*United States v. Perea,* 986 F.2d 633, 639 (2d Cir.1993) (citations omitted).

[13]494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

[14]*Id.* at 334, 110 S.Ct. 1093.

[15]FN15. *Id.* at 333, 110 S.Ct. 1093.

[16]392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[17]*Id.* at 21, 27, 88 S.Ct. 1868.

and *Michigan v. Long*,[18] which had approved, in like circumstances, preventative searches of automobiles for weapons during roadside encounters.

Buie strongly suggests the proper result here. The concern for safety when an officer is lawfully present in the home to assist with an OP in a domestic dispute, as occurred in this case, is no less than when the officer is there to make an arrest. Each situation is fraught with the potential for ambush and violence. To be sure, Miller was not belligerent when the officers arrived. Moreover, the presence of two armed officers between Newkirk, wherever precisely he was, and Miller at the time Miller went into the rear bedroom suggests that the risk of violence to Newkirk at that moment was limited. Nevertheless, Officer Vidal knew that the defendant allegedly had threatened "to put a bullet through [Newkirk's] head," a statement which implied motive, a willingness to resort to violence, and access to firearms. He knew also that Newkirk had taken the threat with sufficient seriousness to obtain an OP. These "articulable facts" gave rise to the entirely rational inference that allowing Miller unsupervised access to the rear bedroom might prove dangerous to the safety of the officers and Newkirk.

Miller's contention that Vidal's previous visit to the room with

[18]463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

Newkirk deprived him of any justification for returning[19] is unpersuasive. The first entrance lasted only briefly,[20] included no search, and did not "preclude the possibility that there was some residual danger."[21] In these circumstances, the minimal intrusion of following Miller into the rear bedroom[22] was justified as a limited protective sweep[23] even assuming that Miller had a reasonable expectation of privacy in that portion of the apartment, an issue that it is unnecessary to reach.

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[19]Def. Mem. 20. Defendant argues also that protective sweeps are limited to places where there is an individual that might pose a danger to the police and that Officer Vidal knew from his first entrance into the room that no one else was in there. *Id.* 15. *Buie* and *United States v. Kiyuyung*, 171 F.3d 78, 83 (2d Cir.1999), however, show that Vidal's objectively reasonable concern regarding the defendant's presence in the room justified his presence.

[20]Tr. 16.

[21]*United States v. Lauter*, 57 F.3d 212, 217 (2d Cir.1995) (declining to suppress evidence of a shotgun and holding protective sweep not to be overbroad, even when another agent had already been in the room in question).

[22]Officer Vidal stood on the left side of the room without touching either of the closet doors. Tr. 19-20.

[23]It is immaterial that Officer Vidal testified that he did not perform a "protective sweep" and that it was not procedure to do so when serving an OP. *Id.* 12. Vidal is a police officer, not a constitutional scholar. However characterized, his testimony that he followed Miller into the rear bedroom "for safety," which the Court credits, demonstrates that his actions constituted a protective sweep for constitutional purposes. The Court notes that the Second Circuit has used the terms interchangeably. *See Kiyuyung*, 171 F.3d at 83.

Conclusion

The motion to suppress is denied in all respects.

SO ORDERED.

Dated: February 23, 2004

/signed/
Lewis A. Kaplan
United States District Judge

(2)

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SUPREME COURT, U.S.

No. 05-1042

In the Supreme Court of the United States

ALFRED G. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether police officers, who were lawfully in an apartment pursuant to a protective order, may conduct a brief, protective sweep when they reasonably fear for their safety.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 430 F.3d 93. The memorandum opinion of the district court (Pet. App. B1-B7) is reported at 306 F. Supp. 2d 414.

JURISDICTION

The court of appeals entered its judgment on November 16, 2005. The petition for a writ of certiorari was filed on February 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of being a felon in possession of a firearm,

in violation of 18 U.S.C. 922(g)(1). He was sentenced to 29 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed the conviction and remanded the case only for resentencing in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005), and *United States* v. *Crosby*, 397 F.3d 103 (2d Cir. 2005).

1. On September 23, 2003, New York City police officers accompanied petitioner's cousin, Kendu Newkirk, to the apartment he had shared with petitioner. Earlier that day, Newkirk had obtained an order of protection against petitioner in the Bronx County Family Court, which provided that he could enter the apartment, accompanied by two police officers, to retrieve his belongings. Newkirk informed the accompanying officers that he had obtained the order of protection because petitioner had threatened to "put a bullet through his head." Pet. App. A4.

Newkirk entered the apartment with his key, encountering petitioner and his girlfriend inside. The officers explained to petitioner that they were serving the order of protection and assisting Newkirk in removing his belongings. Pet. App. A4-A5. Petitioner then asked the police to "watch [Newkirk]" because "I don't want [him] to take my stuff." *Id.* at A5. As Newkirk was packing his belongings, petitioner asked the officers if he could enter a bedroom from which Newkirk had just exited to retrieve something. *Ibid.* One of the officers assented, but then followed petitioner into the bedroom "[f]or safety." *Ibid.* When following petitioner out of the room, the officer saw a shotgun standing upright in an open closet and in plain view. *Id.* at A5, B3. The officers arrested petitioner, who turned over another firearm and admitted possession of them both. *Id.* at A5.

2. A grand jury returned a one-count indictment that charged petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Petitioner moved to suppress the firearms and his statements. The district court denied the motion to suppress. Pet. App. B1-B8. The court held that the officer's entry into the bedroom with petitioner was a permissible protective sweep under *Maryland* v. *Buie*, 494 U.S. 325 (1990). The Court noted the "enhanced risk of danger experienced by an officer in a home," where the officer is "on his adversary's 'turf.'" Pet. App. B5 (quoting *Buie*, 494 U.S. at 333). While *Buie* involved the execution of an arrest warrant, the court reasoned that the "concern for officer safety when an officer is lawfully present in the home to assist with an OP [order of protection] in a domestic dispute * * * is no less than when the officer is there to make an arrest," because "[e]ach situation is fraught with the potential for ambush and violence." *Id.* at B6. Because petitioner's earlier threat to "put a bullet through [Newkirk's] head" "implied motive, a willingness to resort to violence, and access to firearms," the court held that the officer reasonably perceived a threat to safety that justified the very limited protective entry into the bedroom. *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A17. The court held that the protective sweep exception to the warrant requirement established by this Court in *Buie*, *supra*, was not limited to in-home arrests. Noting *Buie*'s analytical roots in the protective pat-downs permitted by *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Michigan* v. *Long*, 463 U.S. 1032 (1983), the court reasoned that, "[a]t the core of *Terry*, *Long* and *Buie* is the common understanding that the Fourth Amendment's reasonableness requirement is sufficiently flexible to allow

officers who have an objectively credible fear of danger to take basic precautions to protect themselves." Pet. App. A9-A10. The court accordingly concluded that *Buie*'s rationale—that officers lawfully present in a home who reasonably fear for their safety must be permitted to take steps to protect themselves—"applies with equal force when officers are lawfully present in a home for purposes other than the in-home execution of an arrest warrant," as long as the officer's presence creates a reasonable risk of "danger that is similar to, or greater than, that which they would face if they were carrying out an arrest warrant." *Id.* at A10. In so holding, the court joined the decisions of several other circuits that had likewise declined to confine the protective sweep doctrine to the specific context of executing arrest warrants. *Id.* at A10-A11.

The court then held that the protective sweep in this case was lawful. Pet. App. A13-A16. The court reasoned that petitioner's specific threat to Newkirk, which had resulted in the court's issuance of a protective order, and the possibility that the emotions aroused by the domestic dispute could resurface, established a reasonable basis for the officer's "limited," "quick and unobtrusive" entry. *Id.* at A15-A16; see *id.* at A16 (officer's entry was "narrowly tailored to dispel the threat that [petitioner] would have posed by being in the second bedroom alone").

ARGUMENT

Petitioner seeks (Pet. 4-8) this Court's review to address whether a protective sweep under *Maryland* v. *Buie*, 494 U.S. 325 (1990), is categorically limited to the in-home execution of arrest warrants. Because the court of appeals' decision is correct and consistent with the

holdings of other circuits, this Court's review is not warranted.

1. The courts of appeals that have addressed the question have consistently held, like the Second Circuit here, that protective sweeps may be permissible when officers lawfully enter a residence for reasons other than the execution of an arrest warrant. See *United States* v. *Martins*, 413 F.3d 139, 150 (1st Cir.) (holding that "police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry"), cert. denied, 126 S. Ct. 644 (2005); *Leaf* v. *Shelnutt*, 400 F.3d 1070, 1086-1088 (7th Cir. 2005) (finding that "it was not necessary for the officers to have made an arrest in order for their search of the apartment to be justified"); *United States* v. *Gould*, 364 F.3d 578, 584-587 (5th Cir.) (en banc) (relying on *Buie* to uphold protective sweep following a consensual entry into an apartment), cert. denied, 543 U.S. 955 (2004); *United States* v. *Taylor*, 248 F.3d 506, 513 (6th Cir.) (same), cert. denied, 534 U.S. 981 (2001); *United States* v. *Patrick*, 959 F.2d 991, 996-997 (D.C. Cir. 1992) (same).

Petitioner's reliance (Pet. 5) on *United States* v. *Waldner*, 425 F.3d 514 (8th Cir. 2005), *United States* v. *Davis*, 290 F.3d 1239 (10th Cir. 2002), and *United States* v. *Reid*, 226 F.3d 1020 (9th Cir. 2000), is misplaced.[1]

Davis creates no conflict because that case addressed the existence of exigent circumstances to enter

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[1] In *Gould*, this Court denied certiorari when the same conflict with *Davis* and *Reid* over the application of *Buie* outside the context of arrest warrants was asserted. See *Gould* v. *United States*, 543 U.S. 955 (2004); Gov't Br. in Opp. at 11-13, *Gould*, *supra* (No. 03-11063). No different outcome is warranted here.

a home in the first place. The court held that no such exigency existed, which rendered the officers' presence in the house entirely unlawful. 290 F.3d at 1243-1244. Accordingly, the court's footnoted observation that *Buie* involved an arrest situation, *id.* at 1242 n.4, was dicta, and it was equivocal dicta at that, see *ibid.* (noting that, "[e]ven if a 'protective sweep' were permissible" in a non-arrest situation, the officers' entry "exceeded the scope prescribed in *Buie*").

Likewise, in *Reid*, the Ninth Circuit invalidated a protective sweep that was undertaken in the absence of voluntary consent to enter the apartment and that thereby extended the scope of the officers' already unlawful intrusion. 226 F.3d at 1026-1027. In addition, while the court observed that *Buie* involved an arrest, and the facts at issue did not, the court immediately went on to hold that "the government did not point to any facts that demonstrated that a reasonably prudent officer would have believed that the apartment 'harbor[ed] an individual posing a danger to those on the arrest scene,'" *id.* at 1027 (quoting *Buie*, 494 U.S. at 334), or even "that another person was inside the apartment," *id.* at 1028.[2]

Thus, both *Davis* and *Reid* stand for nothing more than the proposition that concerns for officer safety do not render lawful an officer's presence in a place where he has no right to be. That distinction between lawful

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[2] Furthermore, as petitioner recognizes (Pet. 5), Ninth Circuit law on this question is not settled. In *United States* v. *Garcia*, 997 F.2d 1273 (1993), the Ninth Circuit upheld a protective sweep that was undertaken "for [the officers'] safety" after officers made a lawful consensual entry into an apartment, *id.* at 1282. There thus is no sound basis for concluding that the present case would have been resolved differently had it arisen within the Ninth Circuit.

and unlawful entries is critical. In *Buie*, the Court emphasized that the "police [had] every right to enter the home" under the Fourth Amendment. 494 U.S. at 334 n.1. It was only after the officers were lawfully inside that "the potential for danger justified a standard of less than probable cause for conducting a limited protective sweep." *Ibid.* That same principle applies when the lawful entry is based upon the enforcement of a protective order. Once lawfully inside, it is the potential for danger rather than the legal basis for entry that justifies a protective sweep based on reasonable suspicion.

In *Waldner*, the Eighth Circuit acknowledged that other circuits had extended *Buie* to non-arrest situations, but stressed that they had done so only upon a "showing of a reasonable suspicion of dangerous individuals in the house." 425 F.3d at 517. The court declined to extend *Buie* further, because in Waldner's case "there [was] no evidence that the officers had any articulable facts that an unknown individual might be in the office, or anywhere else in the house, ready to launch an attack." *Ibid.* The court thus held that, "[u]nder these circumstances," the protective sweep "exceeded its permissible scope." *Ibid.* A concurring opinion by Judge Murphy underscored that the court's decision "does not mean that *Buie* would always foreclose a protective sweep when officers are serving a protective order." *Id.* at 518.

2. Contrary to petitioner's argument (Pet. 7-8), the court of appeals' decision does not cloud the standard for protective sweeps articulated in *Buie*. Whether officers enter a residence pursuant to an arrest warrant or some other lawful basis for entry, the standard for a protective sweep remains the same. The officers must have a reasonable, articulable basis for determining that a